

REPRODUCTIVE HEALTH CARE BILL AND THE ADOLESCENT:
ALIGNING ADOLESCENT HEALTH TO SUSTAINABLE DEVELOPMENT
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BY

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The Reproductive HealthCare Bill 2014 meant to:

- Recognize reproductive rights,
- Set standards for reproductive health care,
- Provide for the right to make decisions regarding reproduction free of discrimination, coercion, violence and control

Legal challenges.

- Definition of child by Children Act (below 18) and adolescent (10-17)
- Supremacy of constitution- protection of family by the state, principle of *parens patriae*-inherent power of state to protect those who cannot protect themselves
- Balance of right to life of the unborn child and adolescent SRHR
- Unconstitutionality and illegality of abortion and consequences thereof
- Best interest of the child, duty of care by service providers,
- Protection of children from abuse, neglect, exploitation
- Legal capacity of adolescents to be autonomous in matters of SRHR (Under 18 years)
- Consent by children on sexual matters- Sexual offences Act
- Freedoms of conscience, religion, will the access to information be mandatory or voluntary?
- Promotion and protection of positive African Culture by Constitution
- Parental responsibility and rights over their children under the Children Act- conflict with SRHR of adolescents
- Conflict between parental responsibility and confidentiality

- SRHR correlated duties- whose is it? Health service providers? Will they take responsibility if things go wrong-e.g resultant inability to conceive?
- Accountability of adolescents for their action? What is informed consent in light of lack of capacity to consent?
- Public participation and consensus of SRHR- morality, societal values
- Power relationship between doctor and patient (adolescent)
- Age appropriate information on SRHR
- Conflict between the Bill and the Sexual Offences, Act, Children Act, Constitution and other laws
- Issues of morality and values vs rights ? A concern for many
- Sustainability beyond current funding

Way forward

- Multi-sectoral approach and wide stakeholder involvement- lawyers, medical professionals, sociologists, anthropologists, religious institutions, educationists, economists, the adolescents, parents, everyone- what is the role of each?
- Existing institutions in the society, informal education

Ideally children should not be encouraged or be seen to engage in sexual relationships. In reality some of them are engaged in sexual activities . The result includes unwanted pregnancies, early/forced marriages, school drop out, sexually transmitted diseases, abortion and even loss of life amongst others. This has amongst other considerations led to the thinking of strategies such as adolescent sexual and reproductive health interventions. However there are concerns that need to be addressed.

Some of the highlights are:

The issue of adolescent sexual and reproductive health rights is a very sensitive and controversial issue that requires a delicate balance of various concerns about the protection of the adolescents, parental rights/duties and societal values.

Is this a battle between the conservatives and the SRHR advocates?

What goal does the Bill aim at achieving? Can it be achieved in any other way? Is the concern-unwanted pregnancies, sexually transmitted diseases, contraception and abortion or morality and societal values?

Although Kenya is part of the global village, there is need to take into account the political, social, economic, cultural and religious environment in which the proposed bill is to be implemented?

Definition of a child and an adolescent

The Constitution does not define who a child is or who an adolescent is. However, section 3 of the Children Act, defines a child as any individual who has not attained eighteen years. This is the definition contained in the United Nations Convention on the Rights of the Child (UNCRC) as well as the African Charter on the Rights and Welfare of the Child (ACRWC), both of which are ratified by Kenya. Since Article 2(5) and (6) provide that any the general rules of international law shall form part of the laws of Kenya under this constitution, and that any treaty or convention ratified by Kenya forms part of Kenya's law, both the UNCRC and the ACRWC are part of laws of Kenya. Therefore adolescents are children according to the laws of Kenya to whom all laws on children apply.

The supremacy of the constitution

Is the Bill consistent with the Constitution of Kenya 2010?

Does it protect the human rights of adolescents' while respecting other peoples' rights?

- Does it protect the life of the adolescent? Where an abortion is provided for as a service, how does one strike a balance between the SRHR of the adolescent and the protection of life that begins at conception under article 26 of the Constitution?
- Does it protect the dignity of the adolescents?
- Does the Bill promote equality between boys and girls?
- Does the Bill respect the privacy of the adolescents?
- Does the Bill ensure adolescents have access to information on SRHR? Is the information age appropriate? Whose responsibility is it to inform the adolescents on SRH issues? Is it the parents or teachers or others? How will it be ensured that the information accessed by the adolescents is used properly and not to their disadvantage?

- Considering the vulnerability of adolescents, to what extent does the Bill protect them from abuse, neglect, exploitation, prostitution, pornography etc?
- What is the balance between SRHR and protection of children from harmful cultural practices such as early/ forced marriages, *moranism*, beading and FGM and GBV?
- Does the Bill protect both boys and girls from discrimination? Are both treated equally? Have existing socio- cultural, economic, religious and ideological barriers that may affect the adolescents ability to exercise autonomy and make informed choices on SRHR been addressed?
- What is the implication of the provisions of the Bill on the freedom of conscience of the adolescents beyond the adolescent period? How will issues of morality, value systems, social stigma, self-blame and self-esteem be dealt with by the adolescent beyond the adolescent period?
Does the Bill respect the religion, belief and opinion of the adolescents? Is there an opportunity for them to express themselves?
- How much public participation has taken place on the Bill?
- Does it promote sustainable health (physical, mental, psychological, spiritual, emotional, social) of the adolescents beyond the adolescent period into adulthood and beyond?
- Does it ensure the adolescents will attain the highest standard of health?
- Will the SRHR services be provided to the adolescents voluntarily or mandatorily? Can the adolescents for example opt out of the SRHR class or is it mandatory?
- Although adolescents can be said to have SRHR, there are also parental responsibility/rights over their children. What is the balance between the two?
- Is the Bill in the best interest of the adolescents? What does it aim at achieving?
Does the Bill protect and promote the right to the highest attainable standard of health for adolescents?
What is the likely effect of the Bill on education and professional achievement vs the highest attainable standard of health by the adolescent?

- To what extent can the above rights of adolescents be limited?

Is the adolescent's immune system and body, biologically and psychologically and emotionally well developed and mature to undertake the responsibilities that come with **sexual and reproductive health responsibilities**?

Adolescent autonomy-To what extent can adolescents take full responsibility for their decisions and action? At this stage they still depend on parents and guardians for many issues. How far can they be autonomous on matters of SRHR?

Constitutional protection of the family

Does the Bill protect the family?

Article 45 -The family is the natural and fundamental unit of society and necessary basis of social order.

Recognition and preservation of the family in which parents exercise parental control and protection over children

The family is recognized and given state protection.

The principle of *parens patriae*-The states's inherent power and responsibility to protect those who are legally unable to protect themselves. Does this Bill violate or promote this principle? How will conflicts between the provisions of the Bill and views of parents be resolved?

The preamble of the Constitution preserves African Culture.

Within the context of the conservation of African culture, it can be argued that the Kenyan child is not expected to engage in matters of sexuality, except when they become adults, enter into a marriage with free consent, thereupon they can exercise equal rights. The rights here can be interpreted to include sexual and reproductive rights. This argument, though conservative, protects the family (union of opposite sex) as the forum within which sexual and reproductive rights can be exercised equally to maintain social order. Social order includes observation, protection and preservation of accepted society's social values and positive culture that defines a people. The reality however is that children are not left out in sexuality matters hence the concern about their sexual and reproductive health and rights, a matter that the drafters of the Constitution opted to remain silent about.

The issue of consent

The Sexual offences Act, is clear on the fact that anyone under 18 years has no-capacity to consent to sexual intercourse

Is the intent of the Bill for the **general good or harm** to the adolescent and the society at large?

Article 14 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) expressly provides for the sexual and reproductive health rights of women. This raises the question as to the difference between women and adolescents.

Whereas the term woman denotes gendered roles and expectations of the female gender, the term adolescent as defined by the Reproductive Health Care Bill 2014 refers to anyone between 10 and 17 years. Whereas the legal definition of a child is anyone below 18 years, this definition leaves out children below 10 years and those above 17 years but below 18 years.

The Maputo Protocol requires the member states to protect, respect and promote women's right to health including sexual and reproductive health. The protection of these rights covers the right of women to control their fertility, whether to have children, the number of children, and the spacing between the children. They also have the right to choose the form of contraceptive to use, and to be protected from sexually transmitted diseases, and to have family planning education. To realize these aspects, the Protocol requires the states to take measures including the provision of affordable, adequate and accessible health services including information, education and communication programs, and to protect the rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the pregnancy endangers the physical and mental health of the mother or the life of the mother or the foetus.

Can the same be said of adolescents?

Do they have the capacity and ability to control their fertility?

Can they decide whether to have children, the number of children, and the spacing between the children?

Can they choose the form of contraceptive to use?

How useful is family planning education to them? What can they do with the knowledge?

These issues have to be examined in light of the General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights). General Comment No. 22 notes issues including the legal, procedural, practical, and social barriers that limit the ability of women to fully enjoy the sexual and reproductive rights

Court decision on adolescent sexual and reproductive rights in Rwanda

Igobozi v Prosecution (RPA O787/15/HC/KIG) (High Court, Rwanda)-**right to abortion for a child impregnated through rape.**

An adult male gave a 13-year-old girl beer disguised as coffee to drink, raped her and she became pregnant. She subsequently suffered depression, stigma, and shame and was unable to continue with her education. She desired to terminate the pregnancy at all costs, including her losing life. Her mother applied to the Intermediate Court of Rwanda to grant the girl the right to abortion. The Intermediate Court declined to grant an abortion order on the following grounds: 1) that there was no criminal case as yet, prosecuted and concluded, in which a suspect had been convicted of the offence of defilement/rape, 2) there was no evidence to prove that the pregnancy was a threat to the girl's life, 3) it was possible to get pregnant without rape/defilement. The child's mother, through an organization, the Great Lakes Initiative for Human Rights and Development (GLIHD) appealed to the High Court in Rwanda on the grounds that: 1) sexual intercourse with a 13 year old is rape and there cannot be any other interpretation, 2) the Intermediate Court did not state how else the girl became pregnant without being sexually violated. The Prosecution argued that only women, not minors, could seek abortion when raped.

The High Court held that in both rape and defilement there is lack of consent by the victim, and cited Article 14(2) c of the Maputo Protocol and stated that;

The court also finds that Article 14(2) c of the Protocol to the African Charter on Human and Peoples' rights on the Rights of Women in Africa ratified by Rwanda and domesticated by Presidential Order no. 05/01 of 03/05/2015 provides that States Parties shall take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape.

The High Court reversed the decision of the Intermediate Court, granted the abortion right to the girl and ordered a specific government hospital to conduct the abortion. The court served the order on the hospital and by the 2nd day the abortion was successfully performed.

The case demonstrates the vulnerability of children to sexual assault and the manipulation by perpetrators. It also shows the impact of sexual assault on the development and growth of the child as well as the impact on the children's ability to achieve their full potential. It also shows the difficulty in accessing reproductive health service such as abortion even where it is legalised. The High Court upheld the child's right to abortion and saved her from all the consequences of the pregnancy that already interfered with her other rights such as education. This cases deals with situations where courts issue orders but leave it for the parties to execute. In this case, the court ensured that the order was executed promptly.

Although the Rwandan Penal Code allows abortion in cases of incest, rape, forced marriages upon certificate from the court to that effect, and on health and therapeutic grounds upon a written report by two medical doctors, the process of getting the certificate or report may take too long and in some cases, after the window period of abortion passes, the same cannot be performed.

Conflict between the Bill and child protection laws

Sustainability of the adolescent health under the Bill?

Health includes current and future?

What is future health of the adolescent life like in future under the Bill?

Every right has a correlated duty? Medically is the adolescent ready physically, mentally, socially, emotionally, psychologically, to undertake the heavy responsibility that accompanies sexual and reproductive rights?